



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL SUIT NO. 225 OF 2010

**FIDELITY COMMERCIAL BANK
LTD.....APPLICANT**

VERSUS

**PENTOIL PETROLEUM LTD.....1ST
RESPONDENT**

NASSER MOHAMED.....2ND RESPONDENT

**ALI MENZA MBOGO.....3RD
RESPONDENT**

**ALI MOHAMMED MOTHAS.....4TH
RESPONDENT**

R U L I N G

The Applicant in the Notice Motion dated 27th January 2011 seeks orders of this court, inter alia, as follows:-

1. That there be a stay of execution of the exparte judgment and decree entered against the Applicants on 26th October 2010, condemning the Applicants to pay the Plaintiff a sum of KShs. 9,598,004.68.
2. That the exparte proceedings leading to the said judgment and decree, as well as the judgment and decree themselves be set aside.
3. That the court grants an enlargement of time for the Applicants to enter appearance and file a defence as per the drafts annexed to the application and the same to be deemed to have been duly filed

upon payment of the requisite fees.

The Application is premised on the grounds that the ex parte judgment, which was entered in default of defence was wrongly entered since the Applicants had not been served with the requisite summons to Enter Appearance. The Applicants contend that in obtaining the judgment, the Respondents misled the court as to service and the facts of the case, and state that no notice of judgment has been served upon them. They hold the view that it is in the interest of justice that the ex parte judgment be set aside and the stay order be granted as no prejudice will accrue to the Respondent in any event.

The application is supported by a 16 paragraph sworn by the 2nd Defendant/Applicant on 27th January 2011 for his own behalf and that of the other Defendants. In it, he depones firstly, that the process server, upon whose affidavit of service the court relied when proceeding ex parte lied on oath that he had served the Respondents with the Summons to Enter Appearance. He annexes to the affidavit the respective Affidavit of Service, together with documentation to show that the Respondents had vacated the premises known as “*Vision Plaza*” shown as the place of service in 2007. A letter dated 29th December 2006, notifying the landlord, (Vision Plaza) of the Respondents intention to terminate their lease, and the landlord’s acceptance of 23rd January 2007, are annexed to the Supporting Affidavit as NM1. Also annexed are documents to show that the 3rd Defendant ceased to be a director of the 1st Defendant.

In reply, the Respondent filed a Replying Affidavit sworn by its Legal Manager in which he depones that the Applicants were aware of the debt and that their proposed defence is a mere denial. Also that the challenges to the service of summons is an afterthought.

Oral submissions were made in arguing the application. Counsel for the Respondent submitted that the court should disbelieve the Applicants since they never sought to cross examine the process server. Whilst asking the court to overlook the issue of service as a mere technicality, counsel on the other hand asks the court to find that the 2nd Defendant cannot purport to represent his co-defendants and that the application has been filed with undue delay.

I have considered the opposing arguments herein and perused the documents filed, as well as the draft defence annexed. The documentation exhibited to prove want of service does, in my view, cast a lot of doubt in the depositions of the process server. The draft defence also shows that the suit is challenged on the basis of the Respondents handling of the Applicant’s account and non-compliance with the terms of the debenture under which it would have realized its securities. The documentation annexed as “NM1” also shows that the 3rd Defendant ceased to be a director of the 1st Defendant on 3rd March 2006 when, under cover of a letter of that date, the Respondent was informed of that fact. This in my considered view would tend to render credence to the Applicant’s claim that the 3rd Defendant may have been improperly sued, with the result that the Applicants have an arguable defence.

For the above reasons, I find that sufficient cause has been shown for me to invoke the provisions of **Order 10 Rule 11** of the **Civil Procedure Rules** on the basis of **Order 22 Rule 22** of the said Rules.

Being satisfied of the merits of the application therefore, I allow the application and grant the orders as sought in prayers (b), (c) and (d) of the same. The Defendants shall file and serve their defence within the next 7 days after which the Plaintiff shall file their reply thereto, if any, within 14 days of service.

Orders accordingly. Costs in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 21ST day of OCTOBER, 2011

M. G. MUGO
JUDGE

In the presence of:

No Appearance

For the Applicant

Mr. Khalwale holding brief for Mr. Mudeizi For the Respondent